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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DUSTIN CHRISTOPHER DWINELL,

Defendant and Appellant.

G033584

(Super. Ct. No. 03HF0291)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Susanne S. Shaw, Judge. Affirmed.

Betty A. Haight, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Deana L. Bohenek, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Dustin Christopher Dwinell of assault with a deadly weapon/assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) and second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)). The jury also found true that defendant personally used a dangerous and deadly weapon and personally inflicted great bodily injury in committing the assault. The court later struck the enhancements and imposed a three-year sentence. On appeal defendant contends the court erred when it denied his motion for acquittal (Pen. Code, § 1118.1) and when it excluded evidence regarding the victim's extensive criminal history and parole status. We disagree and affirm the judgment.

## FACTS

Late one evening, defendant and three of his companions, Joshua Phillips, John Vitale, and Tanya Curry drove to an area in Laguna Beach known as Table Rock Beach to drink some beer. To reach the beach, they descended a fairly long and steep public access stairway, which, by defendant's count, contained 158 steps. The group then crossed a section of beach to ascend to the top of a private access stairway where they commenced to drink their beer. Defendant and Phillips tossed the empty containers toward a small cave on the beach below.

Larry Whitmarsh, an apparently homeless transient, had decided to sleep in the cave that night. Whitmarsh woke up when he heard someone ask him in a "very sarcastic and belligerent" voice what he was doing on the beach. Whitmarsh saw a small group of individuals and told them to leave him alone. A little later, Whitmarsh heard something fall next to his head just before he was hit in the head and body with some bottles. Later, he saw three males standing about 20 feet away. Whitmarsh rose to his feet and told them to leave. As the men began to approach him, Whitmarsh lunged at them, and they ran away. As Whitmarsh followed the men up the beach toward the

public stairs, he heard them say, “Come on up here, punk, we’re going to kick your ass.” Whitmarsh retorted, “Fuck you. Come and get some, punk.” Someone shined a flashlight in his eyes and then struck him in the head. Whitmarsh swung his arms and hit one of the men before being hit in the head again.

As Whitmarsh continued to defend himself, he “got walloped on the top of [the] head” and heard a crack; it felt like he had been hit with a baseball bat. Whitmarsh fell to his knees while the three men continued to beat and kick him in the ribs, back, head, and front torso. After briefly passing out, he saw a short, heavyset male approach him; reaching into his pocket and pulling out a knife, Whitmarsh stabbed the person in the leg before the person could kick him. The man screamed, and his friends pulled him away. Whitmarsh fell into unconsciousness.

During the assault, Whitmarsh could feel someone tugging at his wallet in his rear pocket. He later told the police he heard someone tell him to give up the wallet. Instead, Whitmarsh tried to hold onto to it. He felt the wallet being yanked out of his pocket after someone hit him on the head really hard. Defendant admitted taking Whitmarsh’s wallet, but claimed he did so in order to identify him as the person who stabbed Vitale.

The next morning, a passerby summoned help for Whitmarsh, who had regained consciousness, and he was airlifted from the beach to the hospital. Whitmarsh sustained numerous cuts and abrasions; an x-ray showed he had a collapsed lung, and his nose had been broken. One of the drugs administered in the emergency room was specifically intended to cause amnesia so that he would not recall events surrounding his treatment.

There were several discrepancies between what Whitmarsh told the police and his testimony at trial. Whitmarsh testified he ended the assault by stabbing Vitale in the thigh, and he later insisted he had the knife with him in his pocket the entire evening. But initially he told an officer at the scene that he had not used the knife. Later at the

hospital, he told Sergeant Kravetz he tried to get to his knife, which he claimed to have left in the cave, but was not able to open it before being struck by his assailants. When the sergeant directly asked Whitmarsh if he had stabbed someone, Whitmarsh responded, “I stabbed him? I thought I sliced him.”

Defendant and Phillips were tried together. They testified they first encountered Whitmarsh when he charged up the private access stairway angrily yelling about a stolen jacket and cigarettes. They saw Vitale kick Whitmarsh in the chest and then saw Whitmarsh swing his arm out at Vitale. Vitale then offered Whitmarsh a cigarette, and “things calmed down.” Whitmarsh accepted the cigarette and retreated to the cave. Vitale told his friends he had been stabbed in the knee. After he rolled up his pant leg to put pressure on the wound, the group walked across the beach to the public access stairs.

Defendant escorted Curry up the stairs to the car and then returned to the beach to join Vitale and Phillips. Defendant claimed he wanted to identify Whitmarsh, so the three men walked toward the cave. Defendant could not remember when he armed himself with the large piece of driftwood he subsequently used in the assault, but at trial he admitted he “[p]ossibly” picked it up on the way toward the cave. Phillips had a beer bottle in one hand and a stick in the other. As they approached the cave Whitmarsh jumped up and asked if the trio “want[ed] some more.” Whitmarsh chased after the men.

After they reached the public stairs, the men turned to confront Whitmarsh. Phillips threw a bottle at Whitmarsh after seeing the knife in his hand. Defendant admitted striking Whitmarsh with the driftwood and kicking until Whitmarsh said, “I’m done, I give up . . . .” Phillips testified that Whitmarsh kept trying to get up and kept swinging the knife as he lay on the ground. Phillips used a stick to hit Whitmarsh’s arm and hand claiming he was trying to get him to drop the knife. He saw Vitale kick Whitmarsh in the face. During the altercation, defendant yelled for Whitmarsh to drop the knife and hand over his wallet. He testified that he wanted the wallet to “find out

who [Whitmarsh] was.” Defendant took the wallet after Whitmarsh was lying on the ground.

Once inside the car, defendant tossed Whitmarsh’s wallet onto Phillips’s lap. Phillips looked at Whitmarsh’s identification and then threw the wallet and its contents out the window. Defendant first drove Curry home and then took Vitale to the hospital. Defendant and Phillips left when a doctor told them the police were enroute. Detective Litchenberg spoke with Vitale at the hospital a few days later; Vitale had a large bandage on his leg and walked with a cane.

## DISCUSSION

### *Denial of Motion for Acquittal On the Robbery Charge*

At the conclusion of the prosecution’s case, defense counsel moved for acquittal pursuant to Penal Code section 1118.1 for lack of evidence. The court summarily denied the motion. Defendant contends this was error as to the robbery charge. He argues, “[i]t is uncontradicted that the wallet was taken as an afterthought for the purpose of identifying the victim. The intent to take the wallet arose only after the use of force.” Not so.

In reviewing the denial of a motion for acquittal we “assume in favor of [the court’s] order the existence of every fact from which the jury could have reasonably deduced from the evidence whether the offense charged was committed and if it was perpetrated by the person or persons accused of the offense. [Citations.]” (*People v. Wong* (1973) 35 Cal.App.3d 812, 828.) We will not reverse “unless it clearly appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached by the court below. [Citation.]” (*Ibid.*)

“Robbery is defined as the taking of personal property of some value, however slight, from a person or the person’s immediate presence by means of force or

fear, with the intent to permanently deprive the person of the property. [Citations.] To support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during the commission of the act of force. [Citation.] ‘[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft.’ [Citation.] The wrongful intent and the act of force or fear ‘must concur in the sense that the act must be motivated by the intent.’ [Citations.]” (*People v. Marshall* (1997) 15 Cal.4th 1, 34.)

During the prosecution’s case-in-chief, Detective Litchenberg testified defendant told him “that he and Mr. Vitale continued beating on Mr. Whitmarsh until he was on the ground. All the while [defendant] was screaming at Mr. Whitmarsh to drop the knife and to hand over his wallet.” Defendant further admitted taking Whitmarsh’s wallet by “grabb[ing] the chain, forcibly pull[ing] the wallet from his pocket.” Whitmarsh testified that he felt his wallet being tugged on while he was being beaten. He further testified he heard voices while his wallet was being removed and that he could have told the police he heard someone say, “Give me your wallet. Just give me your wallet.” These facts are more than ample to support the court’s order denying defendant’s motion for acquittal. They show that defendant, by his own admission, continued to beat Whitmarsh while demanding that he hand over the wallet. The demand showed defendant’s intent to take the wallet was formed during the use of force, not afterward, thus satisfying the elements needed to support the robbery charge. In short, the court did not err in denying the motion for acquittal.

#### *Limitation on Evidence Relating to Whitmarsh’s Criminal History*

Defendant argues the court erred by excluding evidence relating to the details of Whitmarsh’s criminal history, including his parole status at the time of the incident. To the extent any error occurred, defendant was not prejudiced as a result.

Before trial, defense counsel sought to admit evidence relating to Whitmarsh's criminal history, noting various convictions in 1970, 1977, 1978, 1986, and 1989, some of which were for burglary and robbery. Defense counsel further asserted Whitmarsh was on parole at the time of the assault and thus had a motive to lie about what actually happened to avoid being charged with violating parole and a possible third strike offense. The court ruled that the defense would only be allowed to ask Whitmarsh whether he had ever been convicted of a felony involving moral turpitude. When the issue was raised again later during trial, the court stated whether Whitmarsh was a three-strikes candidate was not relevant and that, based on the age of his prior convictions, he did not, in any event, appear to be one. When defense counsel insisted that Whitmarsh was a candidate for a third strike based on his first degree burglary convictions, the court stated, "That is so 352. . . [¶] . . . [¶] . . . [A]lthough he did have [robberies] and [burglaries], . . . [h]is last conviction, to my knowledge, was probably twenty years ago or so . . . ."

In a criminal trial, the court has discretion to admit evidence of a prior conviction involving moral turpitude to impeach a witness. (*People v. Feaster* (2002) 102 Cal.App.4th 1084, 1091.) Prior convictions for crimes such as robbery or burglary are probative on the issue of a witness's credibility. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) In exercising its discretion, the court must consider "whether the conviction (1) reflects on honesty and (2) is near in time. [Citation.]" (*People v. Clair* (1992) 2 Cal.4th 629, 654.) Once the court determines such evidence is admissible, questions about the witness's prior convictions "must be limited to the fact of conviction and the nature of the crime; [the cross-examiner] may not go into the details or circumstances surrounding the crime [citations]; and certainly the cross-examiner cannot delve into the question of the . . . circumstances surrounding the parole of a [witness]." (*People v. Wynn* (1941) 44 Cal.App.2d 723, 732.) Nevertheless, the fact that a

prosecution witness is on parole “is admissible to show the witness’s potential bias resulting from concern about possible revocation. [Citation.]” (*People v. Price* (1991) 1 Cal.4th 324, 486.)

The prior convictions at issue here were fairly remote in time, having occurred between 1970 and 1989. Based on this overall remoteness of the prior convictions, the court did not abuse its discretion by limiting any inquiry to whether Whitmarsh had ever been convicted of a felony offense involving moral turpitude. The court did, however, abuse its discretion by excluding evidence of the fact Whitmarsh was on parole at the time of the incident. This is particularly so where the evidence showed Whitmarsh did not volunteer to the police that he used his knife to stab one of his assailants, and, in fact, initially denied having used the knife at all. Nevertheless, we deem the error harmless under any standard of review.

Defendant admitted beating up Whitmarsh, but claimed he and his friends acted in self-defense; the jury was instructed accordingly on this theory of the case. But as the prosecutor argued to the jury, even if they found defendant’s version of the events to be credible—that Whitmarsh stabbed Vitale’s knee when he first approached the group on the private stairs—the right of self-defense was not available to defendant because he later sought out Whitmarsh after having retreated to a place of safety. “[W]hen a defendant seeks or induces the quarrel which leads to the necessity for [injuring] his adversary, the right to stand his ground is not immediately available to him, but, instead, he must first decline to carry on the affray and must honestly endeavor to escape from it. Only when he has done so will the law justify him in thereafter standing his ground and [injuring] his antagonist. [Citation.]” (*People v. Holt* (1944) 25 Cal.2d 59, 66.) Thus, the court’s refusal to admit the challenged evidence regarding Whitmarsh’s parole status was not prejudicial in light of the facts.



DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.